IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE AETNA INC.	:	CIVIL ACTION
SECURITIES LITIGATION	:	MDL NO. 1219
	:	(All Cases)

MEMORANDUM

Padova, J. **January , 2001**

Before the Court is Plaintiffs' Motion for Approval of Settlement and Plan of Allocation, and Plaintiffs' Motion for Approval of their Application for Attorneys' Fees and Reimbursement of Expenses. After a fairness hearing held on December 18, 2000, and for the reasons that follow, the Court grants both Motions.

I. BACKGROUND

Plaintiffs brought this securities fraud action on behalf of a certified class ("Class") of purchasers of the common stock of Aetna, Incorporated ("Aetna") during the time period from March 6, 1997, through 7:00 a.m. (Eastern standard time) on September 29, 1997 ("Class Period"). Plaintiffs alleged that Defendants Aetna, Richard Huber[1] ("Huber"), Leonard Abramson[2] ("Abramson"), and Ronald Compton[3] ("Compton"), through a series of accounting and actuarial

[1]Huber was Aetna's Vice Chairman for Strategy and Finance and Chief Financial Officer during the Class Period, and Director, President and Chief Executive Officer as of June 1, 1997.

[2]Abramson was dismissed from the suit by Order dated February 2, 1999. Abramson was a member of Aetna's Board of Directors and specifically a member of the Board's Finance Committee, and founder and principal officer of U.S. Healthcare ("USHC") at the time of the merger.

[3]Compton was Aetna's Chairman of the Board, Chief Executive Officer, and President until June 1, 1997.

manipulations, caused Aetna to falsify its publicly filed financial statements by reporting materially understated medical expenses and artificially inflated operating earnings throughout the Class Period. Plaintiffs asserted claims under Section 10(b), Section 20(a), and Section 20A(a) of the Securities and Exchange Act of 1934 ("Exchange Act"), 15 U.S.C.A. § 78j(b), 78(t)(a), and 78A(a) (West 1997), and Rule 10b-5, promulgated thereunder, 17 C.F.R. § 240.10b-5 (1999).

This case arises from the merger of Aetna with USHC on July 19, 1996. At the time of the merger, Defendants allegedly publicly stated that the merger would generate an annual increase of $ 300 million in operating income per year, a major portion of which would come from reduced HMO medical expenses. Defendants forecasted that such increases would be achieved within eighteen months of the merger, by January 1998. Plaintiffs allege that by October 1996, Defendants had learned that USHC's medical expense reserves were understated by $ 76 million. Plaintiffs claim that Defendants engaged in accounting and actuarial manipulations to artificially lower Aetna's reported medical expense reserve in violation of Generally Accepted Accounting Principles ("GAAP") allegedly to conceal this material shortfall and to create a false impression that medical costs were flat and in accordance with expectations throughout the Class Period. Additionally, to meet analysts' earnings expectatins and further conceal the medical expense reserves shortfall, Aetna reclassified certain reserves as unnecessary and released $ 69 million of such reserves into operating earnings in the first two quarters of 1997. This release allegedly inflated Aetna's reported earnings.

Plaintiffs claim that Aetna's quarterly earnings announcements and other public statements included materially false claims that the integration of USHC and Aetna was rapid and successful and that medical costs were flat and under control. Plaintiffs assert that such statements were known to be materially false in that Aetna was encountering significant problems in integrating USHC's medical claims processing operations with Aetna. As a result of Defendants' conduct, Plaintiffs contend that public investors were mislead into believing that the USHC merger and operations integration was proceeding successfully, and that Aetna was meeting all of the expectations Defendants had represented to the market.

According to Plaintiffs, Aetna concealed the integration problems and inflated its reported earnings until September 29, 1997. On that date, Aetna announced that its third quarter earnings would be below analysts' consensus estimates and that it would increase its medical claims reserves because of the problems arising from the merger. Upon this announcement, the share price of Aetna common stock fell ten percent, from $ 90.50 to $ 81.00.

Plaintiffs also charged Defendants Compton, and Abramson individually with insider trading in violation of section 20(a) of the Exchange Act. Plaintiffs alleged that Abramson sold more than 1,350,000 shares and Compton sold more than 90,000 shares of Aetna common stock on the open market while in possession of material and adverse nonpublic information. To this end, Plaintiffs asserted two subclasses of Class members who purchased Aetna common stock contemporaneously with the sales and who were allegedly damaged by Abramson's and Compton's conduct.

A. <u>Procedural History</u>

In November 1997, class action complaints were filed against Defendants in the Eastern District of Pennsylvania and the District of Connecticut. On April 10, 1998, the Judicial Panel on Multidistrict Litigation consolidated and transferred the cases to this Court for pretrial proceedings pursuant to 28 U.S.C. § 1407. The Court thereafter appointed lead and liaison counsel[4] and lead plaintiffs[5] pursuant to 15 U.S.C. § 78u-4. Plaintiffs filed a Consolidated and Amended Class Action Complaint ("Amended Complaint") on June 15, 1998. Count One alleged violations of section 10(b) of the Exchange Act and Rule 10b-5 against all Defendants. Count Two asserted liability as controlling persons of Compton, Huber, and Abramson for violations of section 10(b) and Rule 10b-5, pursuant to section 20(a) of the Exchange Act. Plaintiffs asserted Counts Three and Four against Abramson and Compton respectively for insider trading in violation of section 20(a) of the Exchange Act. Following extensive briefing and oral argument, on February 2, 1999, the Court granted Defendants Aetna, Compton, and Huber's Motion to Dismiss the Amended Complaint in part for failure to comply with the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b)(1), holding that Plaintiffs' information and belief allegations did not comply with the heightened pleading requirements of the PSLRA. The Court further dismissed Abramson from the suit.

With the Court's leave, Plaintiffs filed a Second Consolidated and Amended Class Action Complaint ("Second Amended Complaint") on February 22, 1999. This complaint restated the allegations of the Amended Complaint, but listed the actual sources of information supporting those allegations and omitted claims against Abramson. Defendants Aetna, Huber and Compton again

[4]The Court's Order identified the Law Offices of Bernard M. Gross, P.C., Savett Frutkin Podell & Ryan, P.C., and Milberg Weiss Bershad Hynes & Lerach, LLP as lead counsel for Plaintiffs. The Court's Order further appointed Savett Frutkin Podell & Ryan, P.C. as liaison counsel.

[5]The Court appointed E. Herskowitz, M. Wolin, P. Goodman, M. Oring, S. Hoffman, R. Farrell, Khusal Mehta, the Rainbow Fund Inc., E. Silvert, T. Kelly, T.B. Cohen, C. Bennett, and W.C. and Sandra Bower as lead Plaintiffs to represent the interests of the class.

moved to dismiss. The Court denied Defendants' motions on March 24, 1999. On April 2, 1999, Defendants moved to certify the issue of the pleading requirements of the PSLRA for interlocutory appeal to the Third Circuit Court of Appeals and sought a stay of discovery pending appellate review. Defendants filed a Notice of Appeal with the Third Circuit on April 19, 1999, that Plaintiffs thereafter moved to dismiss. On May 5, 1999, the Third Circuit dismissed Defendants' appeal. The Court later denied Defendants' motion for certification of the appeal.

Defendants next sought an immediate stay of discovery and moved to dismiss the suit pursuant to Federal Rule of Civil Procedure 60(b) based on alleged misrepresentations to the Court. Following extensive and adversarial briefing and a hearing, the Court denied both motions finding no fraud had been committed.

On August 6, 1999, upon Plaintiffs' motion, the Court certified the following Class pursuant to Federal Rule of Civil Procedure 23:

> all persons who purchased the common stock of Aetna Inc. on the open market during the period from March 6, 1997 through and including 7:00 a.m. (EDT) on September 29, 1997 (the "Class Period"), and a subclass of persons who purchased on the open market Aetna common stock contemporaneously with the sales of such stock by Defendant Ronald Compton.[6]

At the close of discovery, Defendants moved for summary judgment on Plaintiffs' claims. Plaintiffs responded with a motion requesting leave to file a Third Consolidated and Amended Class Action Complaint ("Third Amended Complaint"). The Third Amended Complaint expanded Plaintiffs' theory regarding the inflation of Aetna's earning reports to include manipulations of FAS

[6]Excluded from the Class are persons who requested exclusion by filing their names with the Court. Defendants, Aetna's officers and directors and their immediate family members, subsidiaries and affiliates of the individual and corporate defendants and their officers and directors are also excluded from participating in the Class.

60 and Extended/Maturity insurance reserves. Plaintiffs alleged that Aetna failed to disclose the release of portions of the company's FAS 60 and Extended/Maternity insurance reserves into earnings that were reported on Aetna's first and second quarter 1997 financial statements. This release allegedly contributed to the overstatement of Aetna's earnings during those two quarters. Defendants vigorously contested the filing of the Third Amended Complaint. Following extensive briefing and a hearing, the Court permitted Plaintiffs to file a Third Amended Complaint and granted Defendant time to conduct additional discovery. During this second discovery period, disputes arose regarding Plaintiffs' expert in which Defendants sought to strike the expert report of F. Gerard Adams and prevent Plaintiffs from deposing certain witnesses.

Defendants refiled summary judgment motions following the second discovery period on May 31, 2000. These motions were ripe and pending before the Court and trial had been scheduled for November 20, 2000, when the parties reached a settlement. The parties had been participating in settlement discussions throughout the course of the litigation both on their own and before Magistrate Judge Charles B. Smith.[7] On September 26, 2000, Plaintiffs filed a Motion for Preliminary Approval of Settlement that the Court approved on October 5, 2000. On December 18, 2000, the Court held a hearing to ascertain the fairness of the settlement.

B. <u>Settlement Terms</u>

The Stipulation of Settlement ("Stipulation") outlines the details of the settlement. The settling Defendants paid into an escrow account $82.5 million on behalf of the Class ("Settlement

[7] Early in the litigation, the Court referred the matter to Magistrate Judge Smith for settlement.

Fund" or "Fund").[8] Stipulation at 14. The Settlement Fund shall be applied to pay Plaintiffs' attorneys' fees and litigation costs in the amount approved by the Court, and costs related to the settlement and notice administration. The Fund then will be distributed to Class members who submit an approved Proof of Claim and Release form ("Authorized Claimant") according to an allocation plan ("Plan").

The Plan sets forth formulas for determining the recognized claim of an Authorized Claimant according to the date of purchase and/or sale of the Aetna common stock:

> (i) for each share of Aetna common stock purchased during the Class Period which an Authorized Claimant continued to hold as of 7:01 a.m. (EDT) on September 29, 1997, the Recognized Claim shall be equal to the "Estimated Inflation Per Share[9]" on the date of purchase; (ii) for each share of Aetna common stock purchased during the Class Period which an Authorized Claimant sold at a loss (i.e. sold for less than the purchase price paid) prior to 7:00 a.m. (EDT) on September 29, 1997, the Recognized Claim shall be equal to the lesser of: (a) the difference, if a loss, between the "Estimated Inflation Per Share" on the date of purchase and the "Estimated Inflation Per Share" on the date of sale, or (b) the difference, if a loss, between the purchase price paid (including commissions, etc.) and the proceeds received (excluding commissions, etc).

Stipulation at 6; Settlement Hrg. P-1 Ex. A (Notice of Settlement of Class Action and Fairness

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[8]The Settlement Fund was fully funded as of December 15, 2000. Defendants deposited $ 4,125,000.00 in an escrow account five days after execution of the Stipulation of Settlement and added the remaining $ 78,375,000.00 on December 15, 2000. The Settlement Fund has been accumulating interest since the time of the first deposit. Plaintiffs project that the Fund will earn approximately $ 1.4 million in interest over an estimated distribution period of six months.

[9]"Estimated Inflation Per Share" means (i) for each day in the Class Period between March 6, 1997 and September 22, 1997, eighteen percent of the closing price on that date; and (ii) for each day in the Class Period between September 23, 1997, and 7:01 a.m. (EDT) on September 29, 1997, ten percent of the closing price on that date, provided that for any purchase on September 29, 1997, the closing price will be the closing price on September 28, 1997. Stipulation at 6 ¶ 15; Notice at 2 ¶ 5.

Hearing ("Notice")) at 2 ¶ 5(a). Members of the Class who sold their shares of Aetna common stock at a price higher than the purchase price of such shares excluding fees and commissions have no recognized claim and accordingly will not share in the Settlement Fund. Stipulation at 7; Notice at 2 ¶ 5(a). Each Authorized Claimant will receive an amount determined by multiplying the Recognized Claim by a fraction: "the numerator of which shall be the net Settlement Fund and the denominator of which shall be the total recognized claims of all Authorized Claimants." Notice ¶ 5(b).

Upon Court approval of the settlement, Plaintiffs and Class members will release all claims arising from or in connection with their purchase or sale of Aetna common stock during the Class Period against Defendants and related parties.[10] The settlement permits Plaintiffs' counsel to seek attorneys' fees and litigation expenses to be paid from the Fund. Stipulation at 17-18. The Notice states Plaintiffs' intent to request attorneys' fees up to 33 ⅓ percent of the Fund, and litigation costs of $ 1.5 million including interest. Notice at 1.

C. Fairness Hearing

On December 18, 2000, the Court held a hearing to determine the fairness of the proposed settlement. Plaintiffs' counsel outlined the settlement terms and plan of allocation, specifically addressing the amount of actual recovery of several different types of Class member claimants, and the present status and funding of the settlement fund and any accumulating interest. Counsel further discussed Plaintiffs' request for attorneys' fees and litigation costs. Significantly, counsel reported

[10]The release prohibits suit against "Defendants and . . . any of their former and present employees, directors, officers, accountants, agents, attorneys, insurers, investment bankers, representatives, affiliates, subsidiaries, and each of their heirs, executors, administrators, beneficiaries, predecessors, successors, [and] assigns." Stipulation at 18.

the receipt of no objections to the settlement. No objectors appeared during the hearing or requested to be heard.

II. MOTION FOR APPROVAL OF SETTLEMENT

While the law generally favors settlement in complex or class action cases for its conservation of judicial resources, the court has an obligation to ensure that any settlement reached protects the interests of the class members. See In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liability Litig., 55 F.3d 768, 784 (3d Cir. 1995); Fed. R. Civ. P. 23(e). Before approving a settlement, the court must examine whether adequate notice was issued to class members. Fed. R. Civ. P. 23(c)(2); In re Ikon Office Sol., Inc. Sec. Litig., 194 F.R.D. 166, 174 (E.D. Pa. 2000). Because the class in this action was certified by Order dated August 6, 1999, the Court need not determine whether to certify a settlement class. The court, however, must scrutinize the terms of the settlement to ensure that it is "fair, adequate, and reasonable." In re General Motors, 55 F.3d at 785.

A. Adequacy of Notice

Both the constitutional mandate of due process and the Federal Rules of Civil Procedure require adequate notice of a proposed settlement. "In order to satisfy due process, notice to class members must be 'reasonably calculated under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." Lachance v. Harrington, 965 F. Supp. 630, 636 (E.D. Pa. 1997) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). Federal Rule of Civil Procedure 23 contains two notice provisions. Fed. R. Civ. P. 23. In Rule 23(c)(2) actions, class members must receive the "best notice practicable under the circumstances, including individual notice to all shareholders who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Notice must be given to all potential members of a Rule 23(b)(3) class informing them of the existence of the class action, the requirements for opting-out of the class and entering an appearance with the court, and the applicability of any final judgment to all members who do not opt-out of the class. Id.; In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 326 (3d Cir. 1998). Rule 23(e) requires all members of the class be notified of the terms of any proposed settlement. Fed. R. Civ. P. 23(e); In re Prudential, 148 F.3d at 326-27. Notice pursuant to Rule 23(e) should summarize the litigation and settlement for the purpose of informing class members of the right and opportunity to inspect the settlement documents, pleadings, and other litigation papers. In re Prudential, 148 F.3d at 327 (quoting 2 Newberg on Class Actions § 8.32 at 8-109).

The Court determines that the notice provided in this case met the requirements of due process and the Federal Rules of Civil Procedure. Pursuant to Order dated October 5, 2000, Plaintiffs mailed a copy of the Notice of Settlement of Class Action and Fairness Hearing ("Notice") to 22,092 individuals and companies identified by Aetna as shareholders and 29,710 individuals and companies identified as a result of the mailing of the Notice of Pendency who did not opt-out of the Class, and 1,365 nominees and brokers by U.S. first class mail on October 13, 2000. Settlement Hrg. P-1 RSM McGladrey Aff. ¶¶ 2, 4, Ex. B. A summary notice was also published in the national edition of the Wall Street Journal and on the Internet through the Business Wire on October 20, 2000. Id. ¶¶ 5, 6, Ex. C, D.

The Notice outlines in detail the settlement terms, including a verbatim statement of the Class, distribution Plan and release. The Notice further states the benefits of settlement from the perspective of each party and the maximum potential request for attorneys' fees and litigation costs. Rather than estimate the potential recovery if the action were to proceed to trial, the Notice lists the issues on which the parties disagree with respect to damages. The Notice informs the recipient of the date and venue of the settlement hearing held on December 18, 2000, and provides information on the right of Class members to appear and the procedures for filing objections to the settlement. The names and contact information of the relevant attorneys are included, as is information on filing a proof of claim and release form. The summary notice gave the essential terms of the settlement and notice of the upcoming fairness hearing, as well as information on how to obtain a copy of the full Notice. After reviewing the Notice and summary notice, the Court concludes that the substance of both was adequate to satisfy the concerns of due process and the Federal Rules. See In re Prudential, 148 F.3d at 328; In re Ikon, 194 F.R.D. 175 (approving notice that stated the settlement terms and plan of allocation, estimated potential recovery at trial, revealed maximum request for attorneys fees, and identified contact information of relevant attorneys and summary notice that summarized essential settlement terms and procedure for obtaining full notice); Fed. R. Civ. P. 23(e).

B. Fairness of Settlement

A court may not approve a settlement in a class action case unless it concludes that the settlement is "fair, adequate, and reasonable." In re General Motors, 55 F.3d at 785. Trial judges have a duty to protect absentees "which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims." In re Prudential, 148 F.3d at 316 (quoting In re General Motors, 55 F.3d at 805). While the decision whether to approve a proposed settlement of a class action rests within the sound discretion of the district court, the court must state on the record its reasons for approving the settlement. In re Prudential, 148 F.3d at 317; Eichenholtz v. Brennan, 52 F.3d 478, 488 (3d Cir. 1995).

Courts consider the following factors to assess the fairness of proposed settlements in class action cases: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness in light of all the attendant risks of litigation.[11] In re Prudential, 148 F.3d at 317 (quoting Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975)(citations omitted)). Consideration of these factors requires reconciliation of two contrary principles. While the court is obligated to ensure that the proposed settlement is in the best interest of the class members by reference to the best possible outcome, it must also recognize that settlement typically represents a compromise and not hold counsel to an impossible standard. See In re Ikon, 194 F.R.D. at 179. The proponents of the settlement bear the burden of establishing that these factors support settlement. In re Ikon, 194 F.R.D. at 179 (citing In re General Motors, 55 F.3d at 785). Applying the above standard, the Court concludes that the proposed settlement in this case is fair, adequate and reasonable.

1. Complexity and Duration of the Litigation

This factor attempts to capture the likely costs of continued litigation in terms of both time and money. In re General Motors, 55 F.3d at 812. With respect to the duration of the litigation, the Court notes that this case has already been pending for over two years, having first been assigned in April 1998. Although the parties have already spent over two years litigating this case, the Court

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[11]Because the proposed settlement here was reached after the class was certified by court order, the Court need not apply the heightened standard of scrutiny applicable to cases in which the parties simultaneously request approval of a settlement and certification of a settlement class. See In re Prudential, 148 F.3d at 317 (citing In re General Motors, 55 F.3d at 805).

concludes that significant costs would still result in the absence of settlement. At the time the parties first proposed a settlement, trial was scheduled for November 20, 2000. Because the parties had amassed an extensive number of potential witnesses, trial would likely have lasted for several months. Given the extremely large sums of money sought by Plaintiffs and the vigorous advocacy by the parties, any outcome, whether by summary judgment or trial, would be subject to lengthy post-trial motions and appeal. See In re Ikon, 194 F.R.D. at 179. The risk of delay could have deleterious effects on any future recovery due to the time value of money.

Of equal importance is the likely complexity of proof in the case. See id. Plaintiffs' allegations center around the thorny issue of Aetna's accounting practices. Extensive expert testimony would be required on the nature of Aetna's finances and accounting practices, the comparison of Aetna's practices with GAAP, and the effects of Aetna's practices on the stock price. See id.; Joint Decl. ¶ 59. The complex nature of the evidence combined with the lengthy duration of the litigation weighs strongly in favor of settlement.

2. Reaction of the Class

This factor gauges the level of support for the settlement among the class members. In re Prudential, 148 F.3d at 318. While the number of members objecting to the settlement or choosing to opt-out of the class may be indicative of the strength of the opposition, the court must be cautious when inferring support from a small number of objectors especially in securities cases where members may be minor shareholders. In re Ikon, 194 F.R.D. at 179 (citing In re General Motors, 55 F.3d at 812). In this case, the deadline for filing objections and entries of appearance to the proposed settlement was November 29, 2000. Notably, no objections or entries of appearance have been received to date.

3. Stage of Proceedings and the Amount of Completed Discovery

This factor captures the notion that courts should only approve settlements where the parties have an adequate appreciation of the merits of the case. In re Ikon, 194 F.R.D. at 179 (citing In re Prudential, 148 F.3d at 319). Accordingly, the nature and depth of discovery is relevant to the propriety of the settlement. Id. at 180.

In this case, discovery closed well before the proposed settlement was reached. Discovery was extensive as outlined in the Joint Declaration filed by lead counsel. See Joint. Decl. ¶¶ 38-65. Plaintiffs sifted through over 700,000 pages of documents, and conducted thirty-four depositions of Aetna personnel, Aetna's public auditors, and securities analysts. Id. ¶¶ 45, 58. The parties each retained several accounting and actuarial experts who developed substantial reports and analysis on liability and damages, and themselves produced voluminous documents. Id. ¶¶ 59-67. Specifically, Plaintiffs employed one expert to independently calculate Aetna's medical expense reserves for the period in dispute, another expert to calculate damages, and yet another to review Aetna's accounting practices. Id. ¶¶ 60-62. Defendants consulted two experts to analyze their accounting and actuarial practices and two experts to rebut Plaintiffs' damage calculations and provide alternate explanations for the decline in stock prices. Id. ¶ 64. Defendants' expert testimony led Plaintiffs to seek an additional rebuttal expert whose report was subsequently hotly contested by Defendants. Id. at ¶ 66. A majority of the experts were deposed by the opposing side. Id. ¶ 67.

The Court concludes that both sides had a reasoned and substantiated opinion of the settlement value and likelihood of success of the case at the time of settlement. The parties reached settlement with the benefit of full investigation of Plaintiffs' claims and allegations. For example, discovery uncovered information that led Plaintiffs to file a Third Amended Complaint that added new allegations of manipulation of specific reserves. Id. ¶ 68. That Defendants' summary judgment motions were ripe for decision at the time of the settlement further demonstrates that the parties had fully assessed the merits of the case prior to settlement. This factor, therefore weighs in favor of settlement.

4. Risks of Maintaining the Class through Trial

The value of a class action rests on certification of the class since the aggregation of claims and claimants enlarges the monetary value of the suit and facilitates proof on the merits through the pooling of litigation resources. In re General Motors, 55 F.3d at 817. The likelihood of obtaining and retaining certification of the class greatly impacts the range of recovery from the action. Id.

The Court granted Plaintiffs' Amended Motion for class certification on August 6, 1999, and ordered certification of the following class:

> (1) all persons who purchased the common stock of Aetna on the open market during the period from March 6, 1997 through and including 7:00 am (EDT) on September 29, 1997 (the "Class Period"), and (2) a subclass of persons who purchased on the open market Aetna common stock contemporaneously with the sales of such stock by Defendant Ronald Compton. Excluded from the Class are defendants, the officers and directors of Aetna, members of the immediate families of such officers and directors, subsidiaries and affiliates of the individual and corporate defendants, and their officers and directors (the "Class").

In re Aetna Sec. Litig., No. Civ. A. 1219, 1999 WL 624516, at *1 (E.D. Pa. Aug. 6, 1999). At the time of Plaintiffs' Motion, Defendants did not contest the "numerosity, commonality, or typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure nor the predominance and superiority requirements of Rule 23(b)(3)." Id. Rather, Defendant challenged the starting date of the Class Period. Id. This is notable in light of the otherwise contentious nature of the early stages of this litigation and the discovery Defendants had on the issue of class certification. See Joint Decl. ¶ 35. While decertification is always a possibility given the conditional nature of all class action certifications, In re Ikon, 194 F.R.D. at 181, complete decertification would have been very unlikely given Defendants' failure to challenge the Rule 23(b) criteria, and the congruity of issues and legal theories of the class members. At most, the Court would have reconsidered the start date of the Class Period. Nonetheless, the risk of alteration of the starting date of the Class Period was eliminated by the settlement. This factor, therefore, weighs in favor of settlement. See In re Ikon, 194 F.R.D. at 181.

5. Risks of Establishing Liability and Damages

The Court must further consider the possible risks of litigation to "balance the likelihood of success and the potential damage award . . . [at] trial against the benefits of an immediate settlement." In re Prudential, 148 F.3d at 319; In re Ikon, 194 F.R.D. at 181. If further litigation presents a realistic risk of dismissal on summary judgment or an exonerating verdict at trial, the plaintiffs have a strong interest to settle the case early. In re Ikon, 194 F.R.D. at 181. If, however, the plaintiffs have strong evidence of liability and would likely prevail at trial, early settlement might be less prudent. Id. When considering this factor, the court should avoid conducting a mini-trial. Rather the court may "give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action." In re Ikon, 194 F.R.D. at 181 (citing Lachance, 965 F. Supp. at 638). Despite their vigorous advocacy of the merits of their claims throughout this litigation, Plaintiffs now identify issues that cast significant doubt on their ability to prevail at summary judgment or trial, or obtain damages. The Court agrees that Plaintiffs faced substantial risk at both the summary judgment and trial stage in proving the merits of their claims. The Court further concludes that Plaintiffs faced a substantial risk in establishing both the amount and causation of damages in this case.

The first consideration is the risk of establishing liability. The instant lawsuit involves allegations of violations of section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder. To prevail, Plaintiffs must show that Defendants made misstatements or omissions of a material fact with scienter, that Plaintiffs relied on such statements, and that the reliance proximately caused injury. See Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1417 (3d Cir. 1997).

Plaintiffs would have had to overcome substantial difficulties in proving that Defendants acted with scienter. To prove scienter, Plaintiffs would have had to show an intent to deceive or defraud, or a sufficiently reckless disregard of the truth demonstrating "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." In re Advanta Corp Sec. Litig, 180 F.3d 525, 539 (3d Cir. 1999) (citing Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977)). In addition to the inherent difficulties in establishing the requisite mental state, Defendants outlined a strong defense in their summary judgment motion based on reasonable reliance on the advice of outside accountants' estimation of the accuracy of Aetna's statement of the disputed reserves, and on internal status reports on the operations integration with USHC. See Defs' Summ. J. Mem. at 2-4, 42-43. While Plaintiff alleges that Aetna understated various reserves and thereby inflated its reported earnings during the first two quarters of 1997, Defendants presented evidence that KPMG LLP, working with Ernst and Young, independently recalculated these reserves and concluded that Aetna's reserves were fairly stated and in compliance with GAAP. Defendants also presented evidence that Aetna had informed shareholders of the risk of the integration in a proxy statement, and evidence indicating that Compton and Huber's public statements about the success of the integration were consistent with the internal monthly reports detailing the progress of the integration that were distributed to senior management.

Defendant Compton further submitted evidence that could have substantially undermined Plaintiffs' claims with respect to Count Three alleging insider trading. Compton claims that he sold only a small portion of his Aetna shareholding for diversification purposes in anticipation of his upcoming retirement. Compton presents evidence that he retained the majority of his Aetna shares and options, and sold shares only after Aetna publicly released its first quarter 1997 earnings information.

The next issue is risk of damages. In a section 10(b) action, the measure of actual damages is the "out-of-pocket loss measured by the difference between the fair value of what the plaintiff received and the fair value of what . . . would have [been] received had there been no fraudulent conduct." <u>In re Ikon</u>, 194 F.R.D. at 182 (citing <u>Lachance</u>, 965 F. Supp. at 643).

First, assuming a finding of liability, Plaintiffs would have faced significant hurdles in proving the speculative value of the stock had there been no fraud given Defendants' aggressive contest to Plaintiffs' damage estimates. On summary judgment, Defendants set forth the theory that Aetna's stock price unforeseeably declined due to a general industry downturn. <u>See</u> Defs' Summ. J. Mem. at 53. Plaintiffs faced the potential difficulty of either establishing that the decline in stock price was not influenced by other factors outside of the alleged misstatements, or separating the fraud's effect on the stock price from that of outside factors. <u>See</u> <u>In re Ikon</u>, 194 F.R.D. at 182-83. Plaintiffs also would have had to successfully counter Defendants' evidence that no information about the allegedly manipulated adjustments to the FAS 60 or Extended/ Maternity reserves was publicly disseminated. Such evidence could preclude any damages claim based on those allegations since the information would not have been incorporated into the stock price absent public disclosure. Defendants further challenged Plaintiffs' ability to prove causation with respect to the integration statements.

Second, Plaintiffs' damages theories rested primarily on the testimony and reports of expert witnesses. Such experts would likely have been challenged on Daubert or other grounds. Plaintiffs, therefore, risked the rejection of its experts first by the Court pursuant to Federal Rule of Evidence 104(a), or by the jury in assessing credibility.

Lastly, the parties differed widely in their damages estimation. Plaintiffs claimed enormous monetary damages of $ 830 million. Settlement Hrg. Tr. at 8. In addition to vigorously disputing any liability, Defendants strongly contested Plaintiffs' damages experts' calculation, claiming that full proof of all liability claims would only entitle Plaintiffs to recover at most $117 million. Id. at 9; Settlement Hrg. Ex. P-3. In light of the wide disparity in damage assessments, Plaintiffs risked the rejection of their expert damages witness by the jury, while Defendants risked entry of a massive damage award against them. The settlement avoids this uncertainty for both sides. See In re Ikon, 194 F.R.D. at 183.

For these reasons, the Court concludes that the risks of establishing liability and damages weigh strongly in favor of settlement.

6. Defendants' Ability to Withstand Greater Judgment

The Court lacks any evidence related to this factor. The factor therefore does not weigh in favor of settlement.

7. Range of Reasonableness

The last Girsh factors ask whether the settlement is reasonable in light of the best possible recovery and the risks the parties would face if the case went to trial. In re Prudential, 148 F.3d at 322. In order to assess the reasonableness of a proposed settlement seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." Id. (quoting Manual for Complex Litigation 2d § 30.44, at 252). "The primary touchstone of this inquiry is the economic valuation of the proposed settlement." In re General Motors, 55 F.3d at 806. In making this assessment, the evaluating court must recognize that settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and guard against demanding too large a settlement based on the court's view of the merits of the litigation. Id.

Considering the present value of money, the difficulties Plaintiffs would likely face in proving liability, the likelihood that the damages received would have been lower than Plaintiffs' maximum estimate, and the aggressive opposition to both liability and damages mounted by Defendants, the Court determines that this settlement falls within a reasonable range. Taking Plaintiffs' maximum estimate of recovery at trial if all issues were resolved in their favor, the gross settlement provides a recovery of approximately ten percent of the best possible recovery. This percentage is consistent with those approved in other securities fraud cases. See In re Ikon, 194 F.R.D. at 183. Furthermore, Defendants argued that the provable losses were substantially lower. Plaintiffs' experts calculated damages to be $ 830 million, while Defendants' experts asserted that Plaintiffs lost at most $117 million. The gross settlement provides the recovery of seventy percent of the losses estimated by Defendants. Additionally, the "hallmarks of a questionable settlement" are absent. Plaintiffs will receive a significant monetary settlement, and there is no suggestion of collusion between Defendants and Plaintiffs' counsel. To the contrary, this litigation has been aggressively pressed by both sides for nearly three years.

In summary, the Court determines that the majority of the Girsh factors weigh strongly in favor of settlement and concludes that the settlement is fair, reasonable and adequate.

C. Fairness of Allocation Plan

In addition to examining the general settlement terms, the Court must further determine the reasonableness of the plan of allocation. See In re Ikon, 194 F.R.D. at 184. "Approval of a plan of allocation of a settlement fund in a class action is 'governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate.'" In re Ikon, 194 F.R.D. at 194 (quoting In re Computron Software, Inc., 6 F. Supp. 2d 313, 321 (D. N.J. 1998)). Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable. Id.

Plaintiffs estimate the amount of the Fund that will be available to distribute to Class members to equal $ 57,900,000.00.[12] The Plan in this case acknowledges the differing losses suffered by Claimants depending on the dates on which they purchased and sold Aetna stock and the price at which they may have sold the shares. The Plan estimates different percentages of inflation of the stock price according to date. These estimates were derived from Plaintiffs' damages expert report. See Settlement Hrg. Tr. at 10; Nye Report at 20 ¶ 42. Plaintiffs' expert calculated the estimated

[12] This amount is the gross Fund of $ 82,500,000.00 less litigation expenses ($ 1,500,000.00), attorneys' fees ($ 24,300,000.00) and estimated administration costs ($ 200,000.00), adding estimated interest ($ 1,400,000.00). See Settlement Hrg. Ex. P2.

inflation percentage from the residual returns on Aetna stock, i.e., the difference between the actual returns on Aetna stock and the returns predicted based on the general market and industry returns. Nye Report at 20 ¶ 41. Between March 6, 1997, and September 22, 1997, the estimated price inflation per share is eighteen percent of the stock's closing price on that date. Between September 23, 1997, and 7:01 a.m. on September 29, 1997, the estimated price inflation per share is ten percent. The price inflation for the latter period is lower than in the former period because on September 23, 1997, the price of Aetna's common stock dropped $ 9.06, a negative return of 8.8 percent. Id. at 13 ¶ 26. According to Plaintiffs' expert, the drop was caused by securities analysts' concerns that Aetna's third quarter earnings would fall short of expectations due to increases in the medical loss ratio, a slowdown in membership enrollment growth, or the failure to realize the cost savings and revenue enhancements from the merger. Id. ¶ 27.

The Recognized Claims of Class members are calculated by applying the estimated inflation per share for the time period during which the purchase or sale occurred to the purchase or sale price. For example the Recognized Claim for a Class member who purchased 1,000 shares on June 13, 1997 at $ 112 3/5 per share and sold those shares on September 24, 1997 at $ 92 5/8 is calculated by adding eighteen percent of the cost of the shares purchased on June 13, 1997 ($ 20,295.00) to ten percent of the amount obtained through the sale of the shares on September 24, 1997 ($ 9,262.50). This member's Recognized Claim would be $ 11,032.50. Assuming full participation by all Class members, the claimant would receive seven percent of the Recognized Claim or $ 648.38.

With respect to differentiation between claimants based on the price at sale, claimants who purchased shares at the start of the Class Period and sold those shares during the Class Period for a price higher than the initial purchase price have no Recognized Claim. See Settlement Hrg. Ex. P2.

Having made a profit on their Aetna stock, such Class Members accordingly will receive no money from the settlement. Settlement Hrg. Tr. at 7. Claimants who suffered losses on their trades, however, will recover approximately seven percent of their Recognized Claims, assuming full participation by all Class members. See Settlement Hrg. Ex. P2.

The Court concludes that this plan of allocation is reasonable. The distinctions made are fair and accurately reflect the different risks and losses experienced by individuals who acquired Aetna stock at different times. It is reasonable to apply a different inflation percentage to shares bought or sold on or after September 23, 1997, since on that date the price of the stock partially adjusted to more accurately reflect Aetna's alleged financial condition. Similarly, it is fair that claimants who reaped a profit on their sales of Aetna stock during the Class Period receive no share of the settlement since they suffered no loss from any alleged misrepresentations.

III. MOTION FOR APPROVAL OF APPLICATION FOR ATTORNEYS' FEES AND COSTS

The Court now turns to Plaintiffs' Motion for Attorneys' Fees and Costs.

A. Costs

Attorneys who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund. In re Ikon, 194 F.R.D. at 192 (quoting Lachance, 965 F. Supp. at 651.) Class counsel has requested reimbursement of litigation expenses in the amount of $ 1,693,915.33. Examining counsel's affidavits attesting to the unreimbursed expenses paid out, the Court concludes that the requested expenses are reasonable. The Court, however, will not award the full amount requested because the Notice sent to Class members states that Plaintiffs' counsel would apply only for costs in the amount of $ 1,500,000.00, plus interest. Settlement Hrg.

Ex. P1 Ex. A at 1. Because of this representation made to Class members, the Court determines that any reimbursement of costs should be limited to $ 1,500,000.00, plus interest.[13]

B. Attorneys' Fees

Class counsel have petitioned for an award of attorneys' fees of thirty percent of the Settlement Fund. District courts approving class action settlements must thoroughly review fee petitions for fairness. In re Prudential, 148 F.3d at 333; In re Ikon, 194 F.R.D. at 192. Although the ultimate decision as to the proper amount of attorneys' fees rests in the sound discretion of the court, the court must set forth its reasoning clearly. Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 196 (3d Cir. 2000); In re Ikon, 194 F.R.D. at 192-93.

There are two methods for calculating attorneys' fees: the lodestar method and the percentage method. In re Ikon, 194 F.R.D. at 193. Under the lodestar method, the court multiplies the number of hours reasonably spent on the litigation by a reasonable hourly billing rate for such services in a given geographical area provided by a lawyer of comparable experience. Gunter, 223 F.3d at 199. The lodestar method has been criticized for potentially encouraging attorneys to delay settlement to maximize fees or undercompensating attorneys for the risk of undertaking complex or novel cases on a contingency basis. Id. The method also places pressure on the judicial system by forcing the court to evaluate the propriety of thousands of billable hours. Id. Due to these flaws, courts have increasingly used the percentage method.

In light of these considerations and in accordance with the Third Circuit Court of Appeals' recommendation, the Court will utilize the percentage method, but cross-check the results against the lodestar award to ensure against an excessive fee award. Gunter, 223 F.3d at 199. The percentage

[13]Plaintiffs' counsel does not object to this reduced reimbursement. Settlement Hrg. Tr. at 16.

will be based on the net settlement fund after deducting the costs of litigation.[14] See In re Ikon, 194 F.R.D. at 193. This approach increases the incentives for cautious expenditure and helps align the interests of the class more closely with those of counsel. Id. The gross Fund is $ 82.5 million. Subtracting the approved expenses of $ 1.5 million from the gross Fund leaves a net Fund of $ 81 million. Thirty percent of the net Fund is $ 24.3 million.

The Court will first address the question whether thirty percent is an appropriate percentage recovery for Class counsel. Since this is a flexible and fact-driven determination, the Court must consider several factors: the percentage likely to have been negotiated between private parties in a similar case; percentages applied in other class actions; the complexity and duration of the litigation; the quality of class counsel; the size of the settlement fund and the number of persons benefitted; the client's views regarding the attorneys' performance; and the risk of nonpayment. See Gunter, 223 F.3d at 197-199; In re Ikon, 194 F.R.D. at 193. Upon a consideration of all of these factors, the Court concludes that thirty percent constitutes a reasonable award to Class counsel.

Despite the marginal weight of the first factor, see In re Prudential, 148 F.3d at 340, the Court concludes that an award of thirty percent is in line with what is routinely privately negotiated in contingency fee tort litigation. See In re Ikon, 194 F.R.D. at 194; Mem. in Supp. of Application for Att'y Fees ("Fees Mem.") at 19-20 (listing cases). Furthermore, awards of thirty percent are commonly awarded in other settlements of securities fraud cases. See In re Ikon, 194 F.R.D. at 194; Fees Mem. at 16-18.

The next factor, the complexity and duration of the litigation weighs strongly in favor of the

[14]The Court will award counsel a percentage of the full recovery because their efforts "were a material factor in bringing about the entire settlement." See In re Prudential, 148 F.3d at 336-38; In re Cendant Corp., 109 F. Supp. 2d 285, 299 (D. N.J. 2000.)

requested fee award. The course of this litigation was prolonged, having been actively litigated for nearly three years, and involved complex issues. Counsel filed extensive briefing addressing the novel question of the pleading standards required under the PSLRA, and complicated issues of class certification and scienter. Counsel successfully defended two well-fought motions to dismiss. Following a condensed discovery period during which counsel conducted thirty-four depositions and analyzed hundreds of thousands of pages of documents, the parties filed extensive summary judgment briefs. At the time of settlement, the parties were preparing for a trial that was expected to last for several months. Extensive summary judgment briefing had been filed at the time of the settlement.

Similarly, the quality of representation by Plaintiffs' counsel weighs strongly in favor of counsel's fee request, as measured by "the quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience, and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel." See In re Ikon, 194 F.R.D. at 194 (quoting Computron, 6 F. Supp. 2d at 323.) The quality of the result and the difficulties faced as described earlier in reference to approval of the settlement certainly favor an award of thirty percent. Furthermore, Plaintiffs faced significant difficulties on top of the substantial risk inherent in any contingency fee action. The legal obstacles of establishing scienter, damages, and causation discussed in previous sections were present. The PSLRA presented additional procedural hurdles that Plaintiffs had to overcome. Plaintiffs worked without the benefit of an investigation of any regulatory agency. Most importantly, Defendants mounted an aggressive and vigorous defense throughout the course of this litigation.[15]

Furthermore, Class counsel is of high caliber with extensive experience in similar class action litigation as evidenced by the attorney biographies filed with the Court. See Compendium Ex. 1, 2, 3. Defense counsel also have an excellent national reputation and have displayed great skill in defending this suit. Both sides consistently submitted documents of superb quality, and were very diligent in preparing filings in a timely manner under tight deadlines. Throughout the litigation, counsel willingly cooperated with each other to focus the disputes on salient issues, while still vigorously advocating their client's position. This Court has made special note of the efficiency and professionalism of counsel in completing discovery and resolving discovery disputes with little court intervention. See Settlement Hrg. Tr. at 3-4.

The size of the Settlement Fund and Class does not weigh against a percentage of thirty percent. While courts generally decrease the percentage awarded as the amount recovered increases, the settlement obtained in this case, $81 million net costs, is smaller than the large settlements for which courts decrease the percentage awarded. See In re Ikon, 194 F.R.D. at 195-96. Furthermore, the settlement benefitted a large class of shareholders. Additionally, the Class members' view of the attorneys' performance, inferred from the lack of objections to the fee petition, supports the fee award.

Checking the thirty percent against the lodestar further confirms the fairness and reasonability of the award. Under the lodestar method, the court first determines the lodestar figure by multiplying the number of hours worked by the normal hourly rates of counsel. In re Ikon, 194 F.R.D. at 195. The

[15] Given the aggressive defense and the difficulty of proving some of the essential elements of the claims, the Court concludes that the risk of nonpayment through either an award of summary judgment to Defendants or loss at trial was significant and real in this case.

court may then multiply the lodestar calculation to reflect the risks of nonrecovery, to reward an extraordinary result, or to encourage counsel to undertake socially useful litigation. Id. (citing In re Prudential, 148 F.3d at 340-41). Plaintiffs' counsel have filed under seal time records periodically throughout the course of the litigation, as well as submitted extensive affidavits detailing the hours spent on the case, a lodestar review, and firm and attorney biographies in support of the hourly billing rates for which they applied. The hours do not appear to be inflated. Examining these materials reveals a total lodestar amount of $ 6,882,924.94 for 22,209.34 hours expended at an average hourly rate of approximately $ 310.00. Although the hourly rates were appropriately calculated by reference to current rates, considering the various rates charged by counsel in this case and the average rate of counsel of comparable experience in the appropriate geographic area, the Court determines an average rate of $ 300.00 per hour to be acceptable. The total lodestar amount using a rate of $ 300 per hour is $ 6,662,802.00. The requested fee award of thirty percent represents a multiplier of 3.6. "Multiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." In re Prudential, 148 F.3d at 341 (quoting 3 Newberg § 14.03 at 14-5). Given the substantial risk of establishing liability and damages in this case, the large amounts of time and money expended, the outstanding quality of counsel, and the adequacy of the settlement reached, a multiplier of 3.6 is reasonable.

For these reasons, the Court determines that the requested percentage recovery is fair and reasonable. This Court sees no principled basis for reducing the requested award by some arbitrary amount. See In re Ikon, 194 F.R.D. at 195. Accordingly, the Court awards Class counsel $24,300,000.00, equaling thirty percent of the Settlement Fund less litigation costs.

IV. CONCLUSION

In summary, the Court concludes that the proposed settlement and plan of allocation is fair, adequate, and reasonable. Class counsel may recover $ 1.5 million in reimbursed litigation costs and attorneys' fees constituting thirty percent of the settlement fund less costs. An appropriate Order follows.